Supreme Court, U.S.
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No. 94-1234

In The

Supreme Court of the United States

October Term, 1994

UNITED CAPITOL INSURANCE COMPANY,

Petitioner,

v.

NICHOLS & ASSOCIATES TRYON PROPERTIES, INC., et al.

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Fourth Circuit

RESPONDENTS' BRIEF IN OPPOSITION

JAMES P. COONEY III
(Counsel of Record)
JOHN H. CULVER III
KENNEDY COVINGTON LOBDELL & HICKMAN, L.L.P.
4200 NationsBank Corporate Center
100 North Tryon Street
Charlotte, NC 28202-4006
(704) 331-7400

Attorneys for Respondents

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

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QUESTION PRESENTED

Whether the Court of Appeals erred in finding that the Petitioner had consented to the jurisdiction of the Bankruptcy Court and waived any objection to its power to enter a judgment in this case?

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RESPONDENTS' BRIEF IN OPPOSITION

Respondents respectfully request that the Court deny the petition for a writ of certiorari seeking review of an unpublished opinion of the United States Court of Appeals for the Fourth Circuit in this case.

STATEMENT OF THE CASE[1]

The issues in this case stem from the efforts of United Capitol Insurance Company ("United Capitol") – the Petitioner – to avoid a policy of casualty insurance for a fire which occurred at the Tryon Mall in Charlotte, North Carolina on April 17-18, 1989. At that time the Tryon Mall was under the supervision of a bankruptcy court trustee for the benefit of the creditors of Nichols & Associates Tryon Property, Inc. ("Nichols & Associates"), two of which were Tryon Associates Limited ("Tryon Associates") and Connecticut Mutual Life Insurance Company ("Connecticut Mutual"). Both held mortgages on Tryon Mall.

United Capitol properly notes that Nichols & Associates purchased the Tryon Mall in January, 1989, some months before the fire. United Capitol fails to note that the first meeting concerning insurance for the Tryon Mall took place on March 13, 1989, more than two weeks before the filing of a petition in bankruptcy. At that time, United Capitol's application for insurance was completed by Aubrey G. Nichols and Willie E. Fickey ("Fickey"), the agent who would later bind United Capitol's coverage. Some days after the initial meeting, but before the payment of premium by Nichols & Associates, United Capitol reviewed the application and authorized the binding of coverage. On March 28, 1989, Nichols & Associates tendered a premium check of $3,781 for three months'

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[1] Pursuant to Rule 24.2, the Respondents tender this Statement of the Case to correct factual misstatements by the Petitioner.

coverage. Thereafter, Nichols & Associates filed for bankruptcy.

Following the filing of the bankruptcy petition, and before the fire, Richard A. Mitchell ("Mitchell") was appointed the trustee for the bankruptcy estate. On April 13, 1989 – five days before the fire – Mitchell contacted the agent, Fickey, to inform him that Nichols & Associates was in bankruptcy and that Connecticut Mutual and Tryon Associates were to be listed as additional named insureds on the policy.[2] Fickey transmitted these names to United Capitol's intermediary and then issued a new binder in United Capitol's name to Mitchell listing Tryon Associates and Connecticut Mutual as additional named insureds.[3] The new binder was transmitted on April 14, 1989, three days before the fire.

United Capitol asserts that before the fire, the Bankruptcy Court "lifted the automatic stay to allow the sale of the Tryon Mall" and that Tryon Associates purchased the Tryon Mall on April 17, 1989. This is incorrect. The Bankruptcy Court lifted the automatic stay for the purpose of permitting the acceptance of foreclosure bids *only*;

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[2] It is undisputed that, at the time he and Fickey filled out the ACORD application, Nichols told Fickey that the mortgagees would need to be placed on the policy; Nichols apparently did not transmit the names of the mortgagees to Fickey before the appointment of a trustee.

[3] The significance of their listing as additional named insureds is that they are entitled to indemnity under the policy of insurance. Indeed, even if coverage is eventually denied to Nichols & Associates, the provisions of the policy specifically provide that the named insureds will still be entitled to indemnity under the policy.

all right, title and interest in the Tryon Mall – including the risk of loss – remained in Nichols & Associates after April 17, 1989.[4] It is undisputed that Nichols & Associates continued to operate the Tryon Mall for months after the fire, collecting rent and providing information when requested to United Capitol. Indeed, within a few months of the fire, United Capitol actually re-bid the Tryon Mall coverage to Nichols & Associates in an effort to continue to insure the Mall.

In the early morning hours of April 18, 1989, a fire occurred at one of the outbuildings at the Tryon Mall. Law enforcement authorities later concluded that the fire was set by carnival workers to cover up a burglary at the outbuilding. These workers were employed by a traveling carnival which was renting a portion of the parking lot at the Tryon Mall for a few weeks; there is no contention that these workers were in any way connected with any of the parties to this litigation.

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[4] Under North Carolina law, no rights become fixed in foreclosure until payment is actually received by the trustee who holds the deed subject to the mortgage, and the deed is then physically delivered to the foreclosing party. That delivery, in turn, cannot occur until after the running of a ten-day period during which upset bids may be filed, the property redeemed by the owner, or a loss occurs which will vitiate the foreclosure bid. Once "upset," under the law then in effect, the entire process of foreclosure began again. *See In re DiCello*, 80 B.R. 769, 772 (Bankr. E.D.N.C. 1987); *Sprouse v. North River Insurance*, 81 N.C. App. 311, 316, 344 S.E.2d 555 (1986). Here, while the Bankruptcy Court lifted the stay for purposes of accepting bids, the stay remained in effect for all other purposes and title to the property was not transferred until October 11, 1989.

United Capitol was immediately notified of the loss and, within 48 hours, sent its Vice President for Claims to Charlotte to investigate the loss. United Capitol's representatives spent several days in Charlotte conducting extensive interviews and receiving detailed information concerning the Tryon Mall. Thereafter, on May 17, 1989, United Capitol unconditionally accepted Nichols & Associates' premium payment.[5]

Despite its unconditional acceptance of premium – and after United Capitol learned that Nichols & Associates would not be renewing United Capitol's insurance policy on the Mall – United Capitol contested coverage for this loss. In August 1990, it formally denied coverage – after participating in a number of Bankr. Rule 2002 examinations in this case under the general jurisdiction of the Bankruptcy Court – and the plaintiffs filed their suit.

In an effort to simplify the claims for recovery against United Capitol, the plaintiffs in this case entered into a Joint Prosecution Order, the terms of which were approved by the Bankruptcy Court and were not objected to by the creditors of the estate. Of significance to this Petition is that the Bankruptcy Court found the case against United Capitol to be a "core" proceeding. That

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[5] Under North Carolina law, unconditional acceptance of premium constitutes a waiver by the insurer of the right to void a policy or contest coverage for a loss based upon information which it knows at the time premium is accepted. *See, e.g., Overstreet v. Kentucky Cent. Life Ins. Co.*, 950 F.2d 931, 943 (4th Cir. 1991).

Order was transmitted to United Capitol with the Complaint in this case – United Capitol never objected to the Order or sought to set aside that finding.

In accordance with the requirements of Bankr. Rule 7012(b), the plaintiffs alleged in their Complaint that the Bankruptcy Court was vested with jurisdiction under 28 U.S.C. § 157 and that the proceeding was a "core" proceeding. United Capitol misleads this Court when it claims that it "denied" that jurisdictional allegation. Rather, the entirety of United Capitol's response to that jurisdictional allegation reads:

> The allegations contained in paragraph 8 of the Amended Complaint are legal conclusions of the Plaintiffs to which Defendant is not required to respond and they are, therefore, denied.

(App. at 3a) Rule 7012(b) required United Capitol to "admit or deny an allegation that the proceeding is core or non-core," and further required United Capitol – if it denied that the proceeding was core – to "include a statement that the party does or does not consent to the entry of final orders or judgment by the Bankruptcy Judge." It is undisputed that no such statement was ever filed by United Capitol in this case.

Following the filing of this adversary proceeding, the plaintiffs tendered discovery requests to United Capitol which were intended to discover the bases for its denial of coverage. Rather than respond, United Capitol embarked on a six-month course of conduct in which it tendered interrogatory responses that were grossly incomplete and misleading, and refused to produce any documents in response to requests until ordered to do so

by the Bankruptcy Court. Even at that, its first production of documents – made in response to an Order compelling their production – was grossly inadequate. Rather, United Capitol chose to delay the production of additional required documents until the first day of scheduled depositions in this case some months after they were to have been produced under the Bankruptcy Court's Order.

Faced with a defendant which had deliberately disobeyed a direct Order to comply with discovery, the plaintiffs, on May 24, 1991, filed their Motion for Sanctions. Among the sanctions sought was the striking of United Capitol's Answer and Entry of Default. United Capitol responded on June 7, 1991; it did *not* raise the issues of whether this was a "core" proceeding or whether the Bankruptcy Court had its consent to enter a final order if this was a "non-core" proceeding.

A hearing on the Motion for Sanctions was held on June 11, 1991. As with its response to the Motion, at no time during the course of that hearing did United Capitol contest the jurisdiction of the Bankruptcy Court or argue that the case was non-core and that it did not consent to jurisdiction. On June 14, 1991, as directed by the Bankruptcy Court, the plaintiffs tendered an Order striking United Capitol's Answer and entering judgment by default. On that same day, United Capitol transmitted its objections to the Order. Of significance to this Petition, the Bankruptcy Court found in paragraph 1 of that Order that this adversary proceeding was a "core" proceeding; United Capitol did not object to this finding.

Subsequent to the entry of the Order striking United Capitol's Answer and entering judgment by default,

United Capitol filed a seventeen page Motion for Relief on June 20, 1991. At no place in that Motion did United Capitol question or contest the Bankruptcy Court's jurisdiction to hear this case or enter a final Order. United Capitol did not raise this issue in either its Brief supporting the Motion for Relief, or during the hearing on the Motion for Relief on July 17, 1991. United Capitol did not object on jurisdictional grounds when the Bankruptcy Court entered a modified sanctions Order which reaffirmed the Entry of Default as the proper sanction.

Following the denial of its Motion for Relief, United Capitol noted an appeal to the District Court for the Western District of North Carolina. It did not raise the jurisdiction or authority of the Bankruptcy Court to enter the Sanctions Order as an issue in its Notice of Appeal. Similarly, in neither its 32-page brief filed before that Court on November 4, 1991, nor in oral argument before that Court on May 21, 1993, did United Capitol raise as an issue – let alone object to – the Bankruptcy Court's power to enter this Order. The sole issue presented to the District Court was whether the sanction entered by the Bankruptcy Court was too harsh. The District Court affirmed the Bankruptcy Court's Order.

United Capitol next appealed to the United States Court of Appeals for the Fourth Circuit. The Docketing Statement served on June 15, 1993 by United Capitol does not contest, raise, or even mention that the Bankruptcy Court's power to enter this type of Order was in question or that United Capitol did not consent to the exercise of jurisdiction by the Bankruptcy Court. This issue was first

raised only on September 30, 1993, when United Capitol served its Brief on appeal.[6]

In a unanimous opinion, the Fourth Circuit rejected United Capitol's position, holding:

> Despite repeated opportunities before the bankruptcy and district courts to object to the bankruptcy court's exercise of jurisdiction over the adversary proceeding filed against it, United Capitol remained silent, acquiescing in the bankruptcy court's authority to enter appropriate orders and judgments in this matter.

Petitioner's Appendix at 7a.[7]

United Capitol now asks this Court to review this decision.

SUMMARY OF ARGUMENT

This case presents no issues of significance. Rather, it involves an unpublished decision of the Court of Appeals

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[6] It must be noted that United Capitol changed its attorneys between the time of the filing of the Docketing Statement to the Fourth Circuit and the filing of its brief. United Capitol's present counsel filed its brief before the Fourth Circuit. Prior to the filing of that brief, United Capitol's present counsel had not participated in any of the proceedings in this case.

[7] Contrary to the suggestion of United Capitol that this issue was not briefed before the Fourth Circuit, *see* Petition at 5, this issue was briefed extensively by *both* parties. *See* Brief of Appellee at pp. 28-31, Reply Brief of Appellant at pp. 1-3. Indeed, footnote 2 of United Capitol's Reply Brief specifically directed the Fourth Circuit to the authorities which United Capitol now claims were not considered.

refusing to allow the Petitioner – after three years and nearly a dozen proceedings – to claim for the first time on appeal that it had not consented to the jurisdiction of the Bankruptcy Court. The Petitioner's claim of a split among the circuits, in light of the actual facts of this case, is non-existent – all circuits agree that with consent objections to the bankruptcy court's jurisdiction are waived. The only question raised by this Petition is whether express written consent – as opposed to consent which is expressed by conduct – is the only way in which jurisdiction may be waived. Moreover, as a consequence of the decision in this case, no final judgment or order has been entered by the bankruptcy court and none may ever be; thus, the Petition seeks an advisory opinion from this Court on a state of facts which may not occur. Finally, the underlying case in these proceedings – contrary to the conclusion of the Fourth Circuit – is a core proceeding; thus, consent is irrelevant.

REASONS FOR DENYING THE WRIT

I. THIS CASE INVOLVES PRINCIPLES OF LIMITED PRECEDENTIAL VALUE WHICH DO NOT CONFLICT WITH OTHER CIRCUITS AND WHICH WERE CORRECTLY APPLIED

United Capitol attempts to portray the issue presented to this Court as one in which a Court of Appeals has rendered a significant decision which conflicts with decisions in other circuits and ignores the 1987 Amendments to the Rules of Bankruptcy. It claims this case constitutes nothing less than "jurisdiction by ambush." In so arguing, United Capitol claims too much.

At the outset, and largely unnoted by United Capitol, the decision of the Fourth Circuit in this case was rendered by unpublished opinion. Under the internal operating procedures of the Fourth Circuit, unpublished opinions have little or no precedential value beyond the case itself; the Court will not use unpublished decisions as authority "[i]n the absence of unusual circumstances," and their citation "is disfavored." I.O.P. 36.6. Thus, far from creating or exacerbating any perceived conflict among the circuits on the question presented, this decision does not even constitute precedent *within* the Fourth Circuit. The Fourth Circuit's rationale in rendering this decision by unpublished opinion appears to be related to the unique and egregious facts of this case, facts which illustrate well why this case is a poor vehicle through which a perceived conflict among circuits should be resolved.[8]

All circuits – despite United Capitol's claims of a conflict – acknowledge bankruptcy courts may enter final orders even in "non-core" proceedings when the parties consent. Bankr. Rule 7012(b) contemplates that such consent will be determined early in the proceeding after the Answer if a party claims jurisdiction is lacking: "If the response is that the proceeding is non-core, it *shall* include a statement that the party does or does not consent to the entry of final orders or judgment." (emphasis supplied) The issue then is not whether bankruptcy courts may enter these types of orders, but rather what

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[8] Significantly, if an opinion is perceived to create a conflict with a decision in another circuit, then the opinion must be published. I.O.P. 36.4(v).

the *form* of jurisdictional consent must take. Quite simply, United Capitol takes the position that only express written consent by a party complies with the jurisdictional requirement for consent; conduct and acquiescence can never, under United Capitol's theory, constitute consent.

Contrary to the extensive discussion in United Capitol's Petition, however, only one circuit has ever intimated that only express written consent can meet the standard for § 157 consent, and that circuit did so in a far different case. In *Home Ins. Co. v. Cooper & Cooper Ltd.*, 889 F.2d 746 (7th Cir. 1989), the Seventh Circuit, in *dictum*, noted that written consent would be required under Rule 7012 – a rule that did not apply to the case before it. Significantly, however, the court also declared that "[a] policy of insurance is an asset of the estate, and a request to determine its validity with respect to the debtor is a 'core proceeding.' " 889 F.2d at 748. Here, of course, the plaintiffs' claims seek to do precisely that: this adversary proceeding seeks to determine whether a substantial asset of the bankrupt estate – the claim arising from the fire at Tryon Mall – is valid under United Capitol's policy of insurance. Thus, even in the single circuit which has indicated that it would require express written consent, there would be a finding of jurisdiction on the facts in this case on the basis that this case constitutes a "core" proceeding.

Of the remaining circuits and cases cited by United Capitol, all agree consent is necessary for jurisdiction in "non-core" cases; the only "disagreement" centers on the quantum of proof needed for such consent. That "disagreement," however, on closer review is wholly illusory. In the two other cases cited by United Capitol in support of its position on consent, neither addressed the question

of waiver itself. Thus, in *In re Davis*, 899 F.2d 1136 (11th Cir. 1990), the Eleventh Circuit found that the appellant did consent to an earlier exercise of jurisdiction on the underlying bankruptcy case, but held simply that this earlier consent did not "carry forward" to a later-filed petition for fees by the trustee under the EAJA. 899 F.2d at 1142 ("That consent clearly did not apply to the EAJA action, however, which was not actually commenced until January 1988 when the trustee renewed his application."). Similarly, in *In re Brickell Investment Corp.*, 922 F.2d 696 (11th Cir. 1991), the Internal Revenue Service had earlier submitted itself to the jurisdiction of the bankruptcy court for the purposes of determining its claims to the estate; the issue on appeal was whether that earlier consent sufficed as jurisdictional consent for the trustee's claim for attorneys' fees under 26 U.S.C. § 7430 in defeating those claims. Citing *Davis*, the Court found that the choice of the IRS in filing claims in the bankruptcy court did not provide the express consent necessary for the determination of a fee award in a separate and later proceeding.

This case presents a vastly different set of facts. Here, no single act is relied upon to establish consent; rather, United Capitol – if it did not consent to jurisdiction – had eleven separate opportunities to reveal its now claimed lack of consent: its Answer, the response to the Motion for Sanctions, the hearing on the Motion for Sanctions, its written objections to the Order imposing sanctions, the Motion for Relief, its Brief in Support of its Motion for Relief, the hearing on the Motion for Relief, its Notice of Appeal to the District Court, its Brief to the District Court, the hearing on its appeal to the District Court, and

its Docketing Statement to the Fourth Circuit. Rather than demonstrating a lack of consent, this record of default demonstrates a repeated voluntary submission to the jurisdiction of the bankruptcy court on these matters. At *no* time before the filing of its Brief before the Fourth Circuit did United Capitol object to, contest, question, or do anything other than knowingly and voluntarily submit to the jurisdiction of the bankruptcy court.

United Capitol claims that its Answer squarely established its non-consent to jurisdiction in this case. Not only did United Capitol's Answer not do this, but it wholly failed to comply with the prerequisites of Rule 7012(b) to contest jurisdiction. Rule 7012(b) requires that a complaint in an adversary proceeding contain allegations that the matter is core or non-core. The plaintiffs in this case alleged this proceeding to be core. United Capitol under Rule 7012(b) was required to admit or deny that the proceeding was core; if non-core, then United Capitol was required to include a statement that it either did or did not consent to the entry of final orders or judgment. As noted above, United Capitol's denial of jurisdiction under § 157 was a denial premised not upon this action being non-core, but rather because the plaintiffs' allegation contained "legal conclusions . . . to which defendant is not required to respond." United Capitol *never* filed a statement of non-consent as required under Rule 7012(b).

The purpose of Rule 7012(b) is to identify at an early stage of the proceeding whether jurisdictional issues exist and, if so, whether the party raising the issue consents to jurisdiction. This allows all parties, and more importantly the court, to address this issue at the threshold of the

litigation. It is intended to prevent a party from submitting itself to the jurisdiction of the court and then, when later dissatisfied with the result, claim lack of jurisdiction. This type of "ambush," however, is precisely what United Capitol has attempted in this case. Far from being a case of "jurisdiction by ambush" as claimed by United Capitol, it is the court system itself that has been ambushed by United Capitol's disregard for the requirements of the rules and its utter failure for more than three years and nearly a dozen proceedings to ever raise this issue.

II. UNITED CAPITOL SEEKS AN ADVISORY OPINION FROM THIS COURT

The deficiencies of United Capitol's Petition are compounded by the realities of the Fourth Circuit's Order. The Fourth Circuit vacated the entry of default and default judgment against United Capitol and remanded the case to bankruptcy court for a review of lesser sanctions. In that review, the bankruptcy court could conclude that sanctions less than default will be effective. These sanctions could include striking certain parts of United Capitol's Answer, declaring certain issues in the litigation as proven, the imposition of monetary fines and the awarding of attorneys' fees. None of these sanctions, either together or by themselves, constitute a final order or judgment; all are within the scope of the bankruptcy court's power in a non-core case. Thus, United Capitol effectively seeks this Court's Writ to determine whether the bankruptcy court can issue an order which may never be issued in this case. At present no such final order exists; none may ever be issued. As such, United Capitol

is asking this Court for nothing more than an advisory opinion on a set of circumstances which may not occur. *See Chicago & Southern Airlines v. Waterman S.S. Corp.*, 333 U.S. 103 (1948) (refusal to render opinion in case where underlying decision could still be modified).

III. THIS CASE CONSTITUTES A CORE PROCEEDING AND THUS THE BANKRUPTCY COURT HAS JURISDICTION TO ENTER A FINAL ORDER

If certiorari is granted in this case, there is an additional ground upon which the judgment of the Fourth Circuit may be affirmed: this adversary proceeding constitutes a core proceeding to which jurisdictional consent is not necessary. This determination, however, is complex and does not involve a conflict among circuits.

This case involves the validity of a contract of insurance – an asset of the bankruptcy estate – in the context of a casualty loss which took place after the filing of bankruptcy and while the Tryon Mall was under the supervision of a bankruptcy trustee. Section 157(b)(2) enumerates a non-exclusive list of those matters which constitute "core" proceedings; such matters include orders concerning the administration of the estate, orders dealing with property of the estate, and orders affecting the adjustment of debtor-creditor relations in the estate. 28 U.S.C. § 157(b)(2)(A), (E) and (O). As noted above, the Seventh Circuit has specifically held that adversary proceedings to determine the validity of contacts of insurance are necessarily core proceedings for they involve "property" of the estate. *Home Ins. Co.*, 889 F.2d at 748.

Other courts, in dealing with similar claims, have looked to the "timing" of the claim; where the claim arises after the petition has been filed, the proceeding to determine the validity of the claim is "core." *See, e.g., In re Ben Cooper, Inc.*, 596 F.2d 1394, 1400 (2d Cir. 1990) ("the timing of a dispute may render it uniquely a bankruptcy case") (post-petition claims for insurance coverage); *In re Kingston Management Co., Inc.*, 137 B.R. 100, 105-6 (Bankr. E.D.N.Y. 1992) (citing cases finding post-petition claims are core proceedings); *In re West*, 128 B.R. 900, 903-4 (Bankr. D.N.J. 1991) (pre-petition insurance contract with post-petition loss is a core proceeding). Indeed, United Capitol's prior counsel never denied that this proceeding was non-core; this issue was raised only by new counsel on appeal.

The Fourth Circuit, however, found that despite the fact that this claim involved a post-petition loss to property of the estate under the supervision of a trustee, the adversary proceeding was "non-core." It did so premised on the principle that where jurisdiction is grounded under the "related to" jurisdiction of 28 U.S.C. § 1334(b), the case can never be a "core" proceeding; only those cases "arising under" or "arising in" a bankruptcy case may, under the Fourth Circuit's analysis, qualify as "core" proceedings. In so holding, the Fourth Circuit disregarded the pronouncements of other courts, and Congress itself, that the interpretation of a "core" proceeding is intended to be "close to or congruent with constitutional limits" on jurisdiction itself. *In re Arnold Print Works*, 815 F.2d 165, 168 (1st Cir. 1987).

Obviously, if this post-petition claim premised on a post-petition loss is a "core" matter, then there is no issue

concerning the consent of the parties to the bankruptcy court's jurisdiction. The question of whether this proceeding is "core" would necessarily need to be determined before the form of the consent to non-core proceedings could be addressed; thus this issue will be part and parcel of any review on the grounds suggested by United Capitol.[9] This added complexity must necessarily weigh against the grant of the Petition and review of this case.

CONCLUSION

This case involves no issues of wide-ranging importance to the administration of justice in this country. Rather, it involves the belated attempts of one party to avoid sanctions for its conduct in a court in which for two years it was content to litigate. The decision of the Fourth Circuit in making United Capitol responsible for its

[9] No cross-petition on this issue is necessary by respondents. Respondents prevailed before the Fourth Circuit on the question of the Bankruptcy Court's jurisdiction to enter this Order. As a general proposition "a party satisfied with the action of a lower court should not have to appeal from it in order to defend a judgment in his or her favor." Stern, *et al. Supreme Court Practice* § 6.35 at p. 364. Indeed, a prevailing party may "defend its judgment on any ground properly raised below whether or not that ground was relied upon, rejected, or even considered by . . . the Court of Appeals." *Washington v. Yakima Indian Nation*, 493 U.S. 463, 476 n. 20 (1979). *See Dayton Board of Education v. Brinkman*, 433 U.S. 406, 419 (1977) (respondent, absent cross-petition, is "entitled . . . to urge any grounds which would lend support to judgment below").

actions constitutes neither new law nor a rift in the circuits; it constitutes the proper application of law under the unusual circumstances of this case.

This the 16th day of February, 1995.

Respectfully submitted,

JAMES P. COONEY III
JOHN H. CULVER III
KENNEDY COVINGTON LOBDELL & HICKMAN, L.L.P.
4200 NationsBank Corporate Center
100 North Tryon Street
Charlotte, NC 28202-4006
(704) 331-7400

Attorneys for Respondents

APPENDIX

IN THE UNITED STATES BANKRUPTCY COURT
WESTERN DISTRICT OF NORTH CAROLINA
CHARLOTTE DIVISION

In re: Nichols & Associates Tryon Properties, Inc., Debtor.	Case No. C-B-89-30349 (Chapter 11)
In re: Saybein Partners, c/o EMES Management Corporation 919 Third Avenue New York, NY 10022, a New York General Partnership Debtor.	Case No. C-B-90-30579 (Chapter 11)
NICHOLS & ASSOCIATES TRYON PROPERTIES, INC., TRYON ASSOCIATES LIMITED, CONNECTICUT MUTUAL LIFE INSURANCE COMPANY, and SAYBEIN PARTNERS, Plaintiffs, v. UNITED CAPITOL INSURANCE COMPANY,	ANSWER TO AMENDED COMPLAINT (Filed Jan. 22, 1991)

BRUNSWICK INSURANCE)
AGENCY, INC. d/b/a THE)
BRUNSWICK COMPANIES,)
BLUE RIDGE INSURANCE)
SERVICES AGENCY, INC.,)
PILOT PROPERTY &)
CASUALTY AGENCY, INC.)
and WILLIS E. FICKEY,)
)
Defendants.)
)
_____)

* * *

5. Defendant is without knowledge and information sufficient to form a belief as to the truth of the allegations contained in Paragraph 5 of the Amended Complaint and they are, therefore, denied.

6. The allegations contained in Paragraph 6 of the Amended Complaint are admitted.

7A. The allegations contained in Paragraph 7A of the Amended Complaint are admitted.

7B. The allegations contained in Paragraph 7B of the Amended Complaint are admitted.

7C. Defendant is without knowledge or information sufficient to form a belief as to the truth of the allegations contained in Paragraph 7C of the Amended Complaint and they are, therefore, denied.

7D. Defendant is without knowledge or information sufficient to form a belief as to the truth of the allegations contained in Paragraph 7D of the Amended Complaint and they are, therefore, denied.

8. The allegations contained in Paragraph 8 of the Amended Complaint are legal conclusions of the Plaintiffs to which Defendant is not required to respond and they are, therefore, denied.

* * *

* * *

IOP 36.4 PUBLICATION OF DECISIONS

Opinions delivered by the Court will be published only if the opinion satisfies one or more of the standards for publication:

i. It establishes, alters, modifies, clarifies, or explains a rule of law within this Circuit; or

ii. It involves a legal issue of continuing public interest; or

iii. It criticizes existing law; or

iv. It contains an historical review of a legal rule that is not duplicative; or

v. It resolves a conflict between panels of this Court, or creates a conflict with a decision in another circuit.

The Court will publish opinions only in cases that have been fully briefed and presented at oral argument. Opinions in such cases will be published if the author or a majority of the joining judges believes the opinion satisfies one or more of the standards for publication, and all members of the court have acknowledged in writing their receipt of the proposed opinion. A judge may file a published opinion without obtaining all acknowledgments only if the opinion has been in circulation for ten days.

Amended effective January 14, 1991.

* * *

IOP 36.6 CITATION OF UNPUBLISHED DISPOSITIONS

In the absence of unusual circumstances, this Court will not cite an unpublished disposition in any of its published opinions or unpublished dispositions. Citation of this Court's unpublished dispositions in briefs and oral arguments in this Court and in the district courts within this Circuit is disfavored, except for the purpose of establishing res judicata, estoppel, or the law of the case.

If counsel believes, nevertheless, that an unpublished disposition of any court has precedential value in relation to a material issue in a case and that there is no published opinion that would serve as well, such disposition may be cited if counsel serves a copy thereof on all other parties in the case and on the Court. Such service may be accomplished by including a copy of the disposition in an attachment or addendum to the brief pursuant to the procedures set forth in Local Rule 28(b).

Amended effective October 2, 1991.

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